No. 134, Original

IN THE

Supreme Court of the United States

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF DELAWARE,
Defendant.

On Exceptions to the Report of the Special Master

REPLY BRIEF OF DELAWARE IN RESPONSE TO EXCEPTIONS BY NEW JERSEY TO THE REPORT OF THE SPECIAL MASTER

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QUESTIONS PRESENTED FOR REVIEW

The State of Delaware supports the Special Master's recommendations. The State of New Jersey has filed three exceptions, which present the following questions:

1. Whether New Jersey's first exception should be overruled because Article VII of the 1905 Compact – read in conjunction with Article VIII's reservation of territorial rights and this Court's cases disfavoring one State from having the power to make grants of another State's lands – does not expressly concede to New Jersey the right to grant submerged lands located within Delaware.

2. Whether New Jersey's second and third exceptions should be overruled because "riparian jurisdiction" does not mean "exclusive jurisdiction" over wharves and other riparian structures, and because a State's exercise of jurisdiction over specific private property rights pertaining to riparian landowners is subordinate to the exercise of general police powers, such as Delaware's application of its coastal zone management laws.

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1785 Compact	1785-1786 Md. Laws ch. 1; 1785 Va. Acts ch. 17 (1785 Virginia-Maryland Compact)
1834 Compact	Act of June 28, 1834, ch. 126, 4 Stat. 708 (1834 New Jersey-New York Compact) (DA 885-88)
1877 Complaint	Complaint, *New Jersey v. Delaware*, No. 1, Orig. (U.S. filed Mar. 13, 1877) (DA 6-40)
1905 Compact	Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1905 Delaware-New Jersey Compact) (App., *infra*, 1a-5a; DA 11-14)
BP	B.P. p.l.c.
Cherry Aff.	Affidavit of Philip Cherry in Support of Delaware on Cross-Motions for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006) (DA 4303-10)
CMP	Coastal Management Program
CZMA	Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 *et seq.*

DA	Delaware's Appendix on Cross-Motions for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006)
DCZA	Delaware Coastal Zone Act of 1971, Del. Code Ann. tit. 7, §§ 7001 *et seq.*
DE SJ Br.	Delaware's Motion for Summary Judgment and Supporting Brief, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006)
DE SJ Opp.	Delaware's Brief in Opposition to New Jersey's Motion for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Feb. 1, 2007)
DE SJ Reply Br.	Delaware's Reply Brief in Support of Its Motion for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Feb. 15, 2007)
DNREC	Delaware Department of Natural Resources and Environmental Control
DRBC	Delaware River Basin Commission
Farnham	Henry P. Farnham, *The Law of Waters and Water Rights* (1904)
FERC	Federal Energy Regulatory Commission

Hansen Aff.	Affidavit of R. Peder Hansen in Support of Delaware on Cross-Motions for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006) (DA 4319-22)
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LNG	Liquefied Natural Gas
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New Jersey I	*New Jersey v. Delaware*, No. 1, Orig. (U.S. filed Mar. 13, 1877)
New Jersey II	*New Jersey v. Delaware*, 291 U.S. 361 (1934)
NJ 1978 CMP	State of New Jersey Coastal Management Program – Bay and Ocean Shore Segment and Final Environmental Impact Statement (Aug. 1978) (DA 4627-34) (excerpt)

NJ 1979 Options Report	New Jersey Dep't of Envtl. Protection, Options for New Jersey's Developed Coast (Mar. 1979) (excerpt) (DA 2383-2517)
NJ 1980 CMP	New Jersey Coastal Management Program: Final Environmental Impact Statement (Aug. 1980) (DA 2627-3170)
NJ Reopen App.	Appendix to Motion To Reopen and for a Supplemental Decree, Petition, and Brief, *New Jersey v. Delaware*, No. 11, Orig. (U.S. filed July 28, 2005)
NJ SJ Br.	New Jersey's Brief in Support of Its Motion for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006)
NJA	Appendix of the State of New Jersey on Motion for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006)
NJDEP	New Jersey Department of Environmental Protection
Rep.	Report of the Special Master, *New Jersey v. Delaware*, No. 134, Orig. (Apr. 12, 2007)
Reuther Aff.	Affidavit of Kurt Reuther in Support of Delaware on Cross-Motions for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006) (DA 4359-70)

Sax Rep.	Expert Report of Professor Joseph L. Sax (dated Nov. 7, 2006) (DA 4279-4302)
Whitney Dep.	Deposition of Steven Whitney, *New Jersey v. Delaware*, No. 134, Orig. (Oct. 10, 2006) (DA 771-810)

INTRODUCTION

This case concerns Delaware's authority to exercise its police powers within a twelve-mile circle in the Delaware River that this Court conclusively determined to be Delaware's sovereign territory in *New Jersey v. Delaware*, 291 U.S. 361 (1934) ("*New Jersey II*"). The Special Master correctly applied two established legal doctrines to interpret the 1905 Compact, each of which supports rejecting New Jersey's exceptions. *First*, for centuries this Court has recognized the bedrock principle that a State has full sovereignty over its lands up to its boundary line and the corollary that an adjoining State may not grant lands belonging to another State. The Master correctly interpreted Article VIII of the Compact to require an express statement to affect either State's territorial rights. In light of that shared presumption against relinquishment of jurisdictional rights, the Master properly read Article VII, which provides that each State "may . . . continue . . . to make grants" of riparian lands on its "own side" of the Delaware River, as not expressly conceding sovereignty over lands that Delaware had always claimed, and later conclusively proved, were part of its territory.

Second, this Court has long recognized that a private riparian landowner's exercise of riparian rights is generally subordinate to a State's exercise of police powers. Even if the Compact somehow could be read as an express surrender to New Jersey of jurisdiction to make grants of Delaware's submerged lands, Delaware nonetheless has authority to continue to exercise its police powers over activities within its boundary. In its 1834 Compact with New York, New Jersey negotiated an express declaration that it "shall have . . . exclusive jurisdiction" over wharves, but the agreed-upon language in the 1905 Compact is quite different, merely giving each State permission to continue to exercise "riparian jurisdiction" on its "own side" of the Delaware River at a time when the States could not agree on their territorial limits and jurisdictional rights. The modifier "riparian" necessarily limits

the scope of the jurisdiction addressed in Article VII and does not impinge on the fundamental power of Delaware to regulate activities within its boundary. Because the Master's recommendations properly applied those two settled doctrines to the 1905 Compact, they should be adopted by this Court.

STATEMENT[1]

A. The Long-Running Boundary Dispute

For centuries until this Court's definitive resolution of the boundary in 1934, Delaware and New Jersey disputed their Delaware River boundary within an area known as the "twelve-mile circle," whose center is the courthouse in New Castle, Delaware. *New Jersey II*, 291 U.S. at 374. Delaware claimed sovereign title to the waters and submerged lands of the river within the circle to the low-water mark on the New Jersey shore based on a 1682 grant from the Duke of York to William Penn. New Jersey claimed title to the middle of the channel. *See id.* at 363-64. This Court found that Penn had always claimed ownership of the subaqueous soil of the river and that court decisions in prior centuries supported Delaware's claim. *See id.* at 374.[2]

1. *New Jersey I*: The fishing dispute

In 1872, Delaware arrested New Jersey citizens for fishing in the eastern half of the river without a Delaware license, setting off an interstate dispute over fishing rights that stirred up longstanding disagreements over boundary and jurisdiction. *See* Rep. 3-4. New Jersey's Governor proclaimed that New Jersey owned the eastern

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[1] For more on the long history of this dispute, *see* Report of the Special Master 2-29 ("Rep."); DE SJ Br. 3-23; DE SJ Opp. 2-19. (Full references to sources and terms for which abbreviated descriptions are provided can be found in the glossary, *supra* pp. xv-xix.)

[2] *See New Jersey II*, 291 U.S. at 367-68 (discussing *Penn v. Lord Baltimore*, 1 Ves. Sen. 444, 27 E.R. 1132 (1750) (upholding Penn's title)); *id.* at 373, 377 (discussing *In re Pea Patch Island*, 30 F. Cas. 1123 (Arb. Ct. 1848) (No. 18,311) (upholding Delaware's title)).

half of the river, and Delaware's Governor responded by asserting exclusive jurisdiction "'over the waters of said river to low water mark, on the eastern side of said river, within the twelve mile circle from New Castle.'" Rep. 4 (quoting DA 929-30).

The commissioners appointed by both States to negotiate an interstate compact were unable to resolve the dispute. *See* DA 963-81; Rep. 4-5. In 1877, New Jersey filed suit, asking this Court to determine the boundary line and claiming that its part of the riverbed extended "from the New Jersey shore thereof to the middle of said river." DA 20 (1877 Complaint). New Jersey also claimed that it had gained sovereignty by prescription and acquiescence, through its licensing of "wharves, docks, piers and other structures." DA 36. However, the only practical controversy identified in New Jersey's complaint concerned fishing rights and Delaware's claimed authority to enforce its fishing license requirement. *See* DA 37-38. The Court granted New Jersey's motion for a preliminary injunction against Delaware's enforcement of its fishing laws on the eastern half of the river. *See* DA 66-68 (Order). By agreement, the case then lay dormant for nearly 25 years. When it filed its Answer in 1901, Delaware specifically asserted title to the submerged lands within the twelve-mile circle and claimed that New Jersey could not acquire "territory, jurisdiction, rights, [or] privileges" unless Congress and the States "expressly and formally consented thereto." DA 118-19.

In 1903, the States appointed commissioners to negotiate a compact, which the New Jersey legislature approved. The Delaware legislature rejected it, however, on the grounds that the compact would harm Delaware fishermen and that it was submitted without proper notice, precluding adequate debate and requiring it to be "rushed through the house with undue haste." DA 4749-50; *see* Rep. 6-7. At the time that the compact was drafted in February-March 1903, New Jersey had not submitted any evidence. By letter dated January 31, 1903, less than two

weeks before the commissioners first met to negotiate the compact, one of Delaware's commissioners and counsel in *New Jersey I*, Attorney General Herbert Ward, advised his Governor that, while proving Delaware's jurisdiction would "entail very considerable expense," "[t]he very laborious and critical examination of ancient documents . . . which preceded the preparation of the somewhat voluminous Answer of the State . . . has greatly strengthened the belief and reliance of counsel for this State upon the justice of her claim." DA 1074-76. While expressing a "well grounded hope that the State of Delaware would be ultimately successful in the suit," Ward advised that, "if the entire controversy between the two States can be settled out of court in a manner creditable and satisfactory to both States, it would seem the part of good reason to attempt to make such a settlement." DA 1076. The record contains no evidence that Delaware ever perceived that it needed to make concessions to New Jersey on its territorial claims to resolve the fishing dispute, and its long-held position on its boundary claim was confirmed by the Court's 1934 decision.

After further proceedings, in February 1905, the parties again appointed commissioners, who agreed to a compact identical to that negotiated in 1903 in all respects relevant here. *See* DA 4245-52 (Hoffecker Rep. 33-40); Rep. 7-8. The States approved the Compact in 1905. *See* Rep. 8.

2. The 1905 Compact

Adopting language from the resolutions appointing the negotiating commissioners, the Preamble to the 1905 Compact declares that the commissioners had been appointed "for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two States" and "to frame a compact . . . looking to . . . the final adjustment of all controversies relating to the boundary line between [the] States."[3] Notwithstanding those ambitious goals, the Articles of the Compact themselves achieved a

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[3] For the 1905 Compact's text, *see* App., *infra*, 1a-5a; Rep., App. B.

limited resolution of the actual controversies that had caused the litigation – fishing rights and the power to make arrests on the river. The first four of the Compact's eight substantive Articles use specific geographic descriptions in addressing certain topics (including criminal jurisdiction and fishing rights) that rendered irrelevant the ultimate location of the boundary, but the next three Articles (V, VI & VII) do not use any specific geographic descriptions at all.

Articles I-III went into effect immediately but were subject to further refinement in Articles IV and V. Under Articles I and II, each State could serve criminal process for crimes "committed upon the soil of said State" or upon "the eastern half of said Delaware River" for New Jersey and "the western half of said Delaware River" for Delaware. Article III provides that the inhabitants of both States "shall have and enjoy a common right of fishery" "between low-water marks on each side" of the river.

Article IV sets forth a process for each State to appoint commissioners to "confer" "for the purpose of drafting uniform laws to regulate the catching and taking of fish in the Delaware River." Those uniform laws, upon adoption, would become the "sole laws" regulating fishing in the river, and each State would then "have and exercise exclusive jurisdiction within said river to arrest, try, and punish its own inhabitants for violation of the concurrent" fishing laws. The Compact does not use the term "exclusive jurisdiction" anywhere else. *See* Rep. 12-14. Article V provides that the two States' current fishing laws "not inconsistent with the right of common fishery" discussed in Article IV "shall continue in force" until the enactment of the concurrent fishing laws provided for in Article IV. Article VI provides that nothing in the Compact shall affect the shellfish and oyster industry. This status quo provision ultimately led to *New Jersey II*'s resolving, in Delaware's favor within the twelve-mile circle, a dispute over where Delaware could regulate that industry.

Article VII provides that "[e]ach State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States." No historical evidence appears to exist of any actual dispute presented in the pleadings in *New Jersey I* that occasioned the drafting of Article VII. *See* DA 4238-41 (Hoffecker Rep. 26-29).

Article VIII reserves the States' rights: "Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth." And Article IX sets forth the procedures for the Compact's execution, ratification, and binding nature "in perpetuity" on both States.

In 1907, Congress ratified the Compact. *See* Rep. 13. Its modest scope in resolving outstanding practical difficulties was confirmed in a joint submission for both States, with counsel explaining to this Court that the "main purpose" of the Compact was to enact "a joint code of laws regulating the business of fishing in the Delaware River and Bay." DA 190.[4] The parties told the Court that the Compact is "not a settlement of the disputed boundary, but a truce or *modus vivendi*." *Id.*

3. *New Jersey II*

In 1929, New Jersey filed a second original action to resolve a dispute concerning oyster beds (which had been left open in Article VI). *See* Rep. 14.[5] In *New Jersey II*,

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[4] *See also* DA 1248 (Letter from DE Att'y Gen. Robert H. Richards to Chairman of the House Judiciary Comm. (Jan. 19, 1907)) ("The object and purpose of this Compact was to settle certain matters concerning fisheries which had been the cause of the litigation for years pending in the Supreme Court of the United States between the two States.").

[5] New Jersey's Attorney General explained in a printed report requested by the New Jersey Governor that the suit was also intended to resolve New Jersey's uncertainty over its rights regarding "wharves, buildings and other improvements" on lands within the twelve-mile circle, and he reported that "no agreement has ever been reached

this Court upheld Delaware's sovereign title to the land, including submerged lands, up to the low-water mark on the New Jersey shore of the Delaware River within the twelve-mile circle. *See* 291 U.S. at 365-78.[6] The Court dismissed as "wholly without force" New Jersey's argument that, in the 1905 Compact, Delaware abandoned its claim to the lands at issue. *Id.* at 377. The Court held that the Compact "provides for the enjoyment of riparian rights, for concurrent jurisdiction in respect of civil and criminal process, and for concurrent rights of fishery. Beyond that it does not go." *Id.* at 377-78 (discussing and quoting Article VIII).[7]

B. Jurisdiction Over Structures In Delaware

1. Delaware's regulation of riparian uses

At the time of the 1905 Compact, owners of riparian lands – lands adjacent to waterways – had authority to exercise a cluster of property rights called "riparian rights," which included the rights to construct wharves extending into an adjacent river, to fish, and to extract water. *See* Rep. 40-41 (citing Restatement (Second) of Torts § 843 (1977)), 46-49 (describing historic right to wharf out); 1 Henry P. Farnham, *The Law of Waters and Water Rights* 281, 302 (1904) ("*Farnham*"). The riparian right to wharf out included "reasonable access to and use of the adjacent water, subject to appropriate regulation" by the State. Rep. 49 (citing *Cummings v. City of Chicago*, 188 U.S. 410, 427 (1903); *Head v. Amoskeag Mfg.*

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between them except upon the right of citizens of both states to fish in the river and bay." DA 2084, 2087.

[6] The Court also resolved a dispute (unrelated to the present controversy) over the States' boundary south of the twelve-mile circle. The Court upheld New Jersey's claim of sovereign title up to the middle of the navigable channel, thereby giving New Jersey sovereignty over submerged lands with valuable oyster beds. *See* 291 U.S. at 378-85.

[7] The States immediately disputed under Article VII whether Delaware could tax wharves extending from New Jersey into Delaware. *See* DA 2095-2135. Commissioners appointed in 1935 were unable to resolve that issue. *See* DA 1987-91, 2137, 2143, 2147-2205.

Co., 113 U.S. 9, 21 (1885)); *see also* DE SJ Br. 49-50. Riparian rights were and remain "always subordinate to the public rights, and the state may regulate their exercise in the interest of the public." 1 *Farnham* 284. From the 1700s to 1961, Delaware permissively regulated riparian rights through the common law subject to the State's "power to regulate or restrict private riparian property rights for public purposes." *City of Wilmington v. Parcel of Land*, 607 A.2d 1163, 1168-69 (Del. 1992).

In 1961, Delaware enacted its first statute regulating submerged lands, and, in 1966, it adopted a more comprehensive law governing leases of state-owned subaqueous lands. *See* Rep. 70-71 (describing regulatory history). The small number of piers and wharves built before the new regulatory regime were formally grandfathered, and Delaware required permits for any subsequent modifications or new structures. *See id.*

In 1971, Delaware enacted the Delaware Coastal Zone Act, Del. Code Ann. tit. 7, §§ 7001 *et seq.* ("DCZA"), prohibiting "[h]eavy industry uses of any kind" and "offshore gas, liquid, or solid bulk product transfer facilities" within the coastal zone, *id.* § 7003, which includes "land, water [and] subaqueous land between the territorial limits of Delaware in the Delaware River, Delaware Bay and Atlantic Ocean," *id.* § 7002(a). In 1972, Delaware rejected as a prohibited bulk transfer facility an application by the El Paso Eastern Company ("El Paso") to build a liquefied natural gas ("LNG") unloading facility extending from New Jersey into Delaware. *See* DA 3469-72, 3477-78, 3483-84.

Also in 1972, Congress enacted the Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq.* ("CZMA"), which permits States to submit coastal zone management programs to the Secretary of Commerce for review and approval, in return for which the States receive federal funding for coastal management. *See id.* §§ 1454-1455. Delaware's coastal zone management program, approved in 1979, concludes that "there is no site in Delaware suitable

for the location of any LNG import-export facility." DA 2591. That conclusion was consistent with a 1978 formal opinion by Delaware's Attorney General finding that the DCZA would prohibit bulk transfer facilities located in Delaware on a pier originating on the New Jersey shore. *See* DA 3882-84 (Del. Op. Att'y Gen. 78-018). Delaware's coastal zone management program also rejected a comment by Salem County, New Jersey, that Delaware law "'unduly restricts development along the Delaware River in New Jersey,'" stating that Delaware's "'jurisdiction extends to the low water mark on the New Jersey shore.'" Rep. 72 (quoting DA 2600, 2605). Finally, in 1986, Delaware enacted the Subaqueous Lands Act, 65 Del. Laws ch. 508, Del. Code Ann. tit. 7, ch. 72, authorizing its Department of Natural Resources and Environmental Control ("DNREC") to regulate any potentially polluting use made of Delaware's subaqueous lands and to grant or lease property interests in state submerged lands. *See* Rep. 71.

2. Boundary-straddling structures within the twelve-mile circle

The record shows that only 14 wharves and piers have ever extended from the New Jersey shore into Delaware within the twelve-mile circle in the last 155 years. *See* Rep. 74. Eleven were built before 1969 during Delaware's common-law regulation era, and those structures were treated as grandfathered under Delaware's regulations. *See id.* Only three of those grandfathered structures arguably extended more than 500 feet from the boundary, the longest being between 600 and 700 feet. *See* DA 4332-33 (Herr Aff. ¶ 28(a), (c), (d)). New Jersey identified only three structures extending past the low-water mark into the twelve-mile circle in 1905. *See* NJ SJ Br. 4-5 & n.4.

Since 1969, only three cross-boundary structures have been built, all regulated by Delaware. *See* Rep. 74-77. *First*, in 1971, Delaware granted a subaqueous lands lease to E.I. du Pont de Nemours & Co. ("DuPont") to dredge Delaware submerged soil, build a dock, and construct a fuel oil storage tank at the DuPont Chambers

Works facility extending from the New Jersey shore. *See* Rep. 74-75. *Second*, in 1990 and 1991, Delaware permitted a proposed coal unloading pier by Keystone Cogeneration Systems and issued a DCZA permit and a subaqueous lands lease (and renewals) for the project. *See* Rep. 75. *Third*, in 1996, Delaware granted the New Jersey Parks and Forestry Division's own request for a subaqueous lands lease to refurbish a pier at New Jersey's Fort Mott State Park, and in 2006, while this litigation was pending, New Jersey applied to Delaware for a renewal. *See* Rep. 75-76. In 2005, Delaware also issued a permit to refurbish an existing pier at Penns Grove, but that work apparently has not yet begun.[8] Recent aerial photographs of the twelve-mile circle depict only those four structures.[9]

Delaware also has required permits for pipelines and power lines crossing the river within the twelve-mile circle.[10] It regularly responds to police, fire, and other 911 requests on the eastern half of the river, *see* DA 4339-42, 4359-66, 4381-99, and taxes a cross-boundary project, *see* NJA 1491a (DE Interrog. Resp. No. 34); DA 4855-57.

3. New Jersey's acknowledgment of Delaware's regulatory authority

For at least a half-century, New Jersey has recognized Delaware's authority over the submerged lands within the twelve-mile circle beyond the low-water mark. In a formal Attorney General opinion in 1956, New Jersey conceded that the 1905 Compact "gave the State of New Jersey no proprietary rights in the soil within the twelve-mile circle," and "New Jersey has no ownership in the soil offshore of said low-water mark." NJA 309a, 312a. In 1972, shortly before Delaware denied permission under the DCZA for the El Paso-proposed LNG facility, it

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[8] *See* DA 3839-44; DA 4327 (Herr Aff. ¶ 15).

[9] *See* DA 4207 (Keystone), 4208 (Penns Grove), 4209 (DuPont), 4210 (Fort Mott), 4211-12 (none), 4367-69 (Reuther Aff. ¶¶ 56-71).

[10] *See* DA 3323-30, 3337-43, 3351-61, 3367-70, 3375-79, 3381, 3755-59 (Columbia Gas, Delmarva Power, and Colonial Pipeline).

notified the Commissioner of New Jersey's Department of Environmental Protection ("NJDEP"), which raised no objection to Delaware's vetoes of LNG terminals or other cross-boundary projects. *See* DA 3481-85.

In 1979, after a multi-year review process for its own coastal zone management plan and a pledge to develop its position on boundary issues with Delaware through consultation with its Attorney General,[11] New Jersey issued a report, "Options for New Jersey's Developed Coast" ("1979 Options Report"), which analyzed Delaware's coastal zone laws and concluded that Delaware may regulate or prohibit a proposed project extending from New Jersey into Delaware. *See* DA 2455, 2509-12. A separate appendix noted the boundary as determined by this Court and concluded that "major development extending into the Delaware River could require approval from the State of Delaware, in addition to approvals from the State of New Jersey." DA 2509. The report recognized that the DCZA applied to cross-boundary projects and that "some types of activities would be *prohibited* from locating along the Delaware River in Salem County, while other facilities desiring to locate along the river would need to *obtain permit approval* from the State of Delaware." *Id.* (emphases added). The report added that, since the DCZA took effect in 1971, "no activity has taken place along the Salem County shoreline which would come under the jurisdiction of the Act." DA 2511; *see also* Rep. 78-80.

New Jersey then developed a 1980 coastal plan that "even more clearly recognized that Delaware has the right to exercise regulatory jurisdiction within the twelve-mile circle." Rep. 81. The plan acknowledged that, "[i]n most of Salem County, the Delaware-New Jersey State boundary is the mean low water line on the eastern (New Jersey) shore of the Delaware River," and it stated that *both*

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[11] *See* DA 4630 (NJ 1978 CMP) ("[NJDEP] will also work with . . . the Attorney General of New Jersey . . . in the next year to resolve boundary issues between New Jersey, Delaware and New York.").

States' "Coastal Management agencies . . . have concluded that any New Jersey project extending beyond mean low water *must obtain coastal permits from both states*." DA 2657 (emphasis added). It also decreed that both States would "coordinate reviews of any proposed development that would span the interstate boundary to ensure that no development is constructed unless it would be consistent with both state coastal management programs." *Id.*

The 1980 draft New Jersey coastal management plan was widely distributed to thousands of interested parties and was reviewed by New Jersey's Governor, Attorney General, legislators, and state agencies,[12] none of whom disputed that Delaware has regulatory authority over boundary-straddling projects. Only Salem County expressed "'strong[] oppos[ition] to the statement . . . that any project in the area must be consistent with both Delaware's and New Jersey's coastal programs and obtain permits from two states,'" but New Jersey rejected that protest in its 1980 plan. Rep. 81-82 (quoting DA 3135).

Finally, in 1989, New Jersey and Delaware amended a 1961 compact concerning public "crossings" (such as bridges) between the two States that are operated by a bi-state entity created by that compact. *See* DA 4433-43 (creating the bi-state Delaware River Basin Authority). The 1989 amendment required that "any project, other than a crossing," with "project" defined to include boundary-straddling "[t]ransportation facilit[ies] . . . adapted for public use" such as "wharves," DA 4434, "shall comply with all . . . coastal zone laws . . . promulgated by the state in which the project, *or any part thereof*, is located," DA 4442 (Art. XXII(a)) (emphasis added).

New Jersey concedes that, until it filed this lawsuit, it recognized Delaware's authority to regulate cross-

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[12] *See* DA 3001 (noting that 3,000 copies were distributed and eight public hearings convened), 3016-26 ("Waterfront Development Rules and Attorney General's Opinion"), 3168 (NJ 1980 CMP), 4636-37 ("Department of Law and Public Safety"); *see also* DA 637-38, 781, 787.

boundary projects within the twelve-mile circle and has never, before this case, sought to exert exclusive jurisdiction over any structure extending into Delaware. *See* DA 4726-27 (NJ Interrog. Resp. No. 10).

4. The parties' history of cooperation

In practice, the States have cooperated over boundary-straddling projects. New Jersey's 1979 Options Report noted that "Delaware has agreed to notify Salem County of any proposed activity along the Delaware or Salem County shoreline which is subject to the [DCZA]." DA 2511. "In return, Delaware has asked Salem County to notify Delaware of any proposed development in Salem County which would fall under [DCZA] jurisdiction." *Id.*

The two States have cooperated on permitting. *See* Rep. 74-84; DE SJ Opp. 13-17. In 1991, New Jersey approved Keystone's permit on the express condition that Keystone first secure Delaware permits. *See* DA 3554; *cf.* DA 3307. An internal analysis developed by New Jersey for the project acknowledged that Keystone needed "a Coastal Zone Permit and a Subaqueous Lands Permit" from Delaware. DA 3519-20. A senior NJDEP official testified in deposition that, throughout his 27-year tenure at NJDEP, "New Jersey had regulatory authority on the New Jersey side of the boundary and Delaware had regulatory authority on the Delaware side of the boundary and any project that would cross over that boundary would need to get approvals from both states in order for the project to go forward." DA 778 (Whitney Dep.).[13] New Jersey adhered to that position even after filing this suit, by applying in 2006 to Delaware to renew the Fort Mott permit. *See* Rep. 76.

C. The Present Controversy

In 2002, BP sought permission from DNREC to construct an LNG unloading terminal named "Crown Landing" that would extend 2,000 feet into Delaware territory, with associated onshore structures in New Jersey. Con-

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[13] *See also* DA 782, 786, 790, 791, 792, 794-95, 800, 807.

struction would require dredging 1.24 million cubic yards of submerged soil, affecting 29 acres of Delaware's riverbed. *See* Rep. 19-20. Although BP indisputably could build its facility in other parts of New Jersey without encroaching on Delaware's submerged lands – including less than two miles upriver of its current preferred site – BP nonetheless has insisted on the location at Crown Landing. *See* DA 4306 (Cherry Aff. ¶¶ 9-10). On February 3, 2005, DNREC determined that the facility was prohibited under the DCZA as an "offshore bulk transfer facility" and a "heavy industry use." Rep. 20. After losing an administrative appeal, BP declined to seek court review. *See id.*

The Federal Energy Regulatory Commission ("FERC") granted BP's Crown Landing application under § 3(a) of the Natural Gas Act, 15 U.S.C. § 717b(a), but conditioned its approval on, among other things, BP's "filing, prior to construction, documentation of concurrence from the DNREC that the projects are consistent with applicable Delaware law, in conformance with CZMA," as well as satisfying all New Jersey requirements. *Crown Landing, LLC*, 115 FERC ¶ 61,348, ¶ 31 (June 20, 2006), *petition for review pending, Delaware DNREC v. FERC*, No. 07-1007 (D.C. Cir.).

On January 7, 2005, BP filed an application with the NJDEP's Office of Dredging and Sediment Technology, which notified BP in a letter filed with FERC that its application was deficient under New Jersey law. The letter also informed BP that "activities taking place from the mean low water line ... outshore *are located in the State of Delaware and therefore are subject to Delaware Coastal Zone Management Regulations.*" DA 4641 (emphasis added).

BP representatives met with New Jersey officials and apparently convinced them to reverse New Jersey's decades-long policy of cooperation and acknowledgement of Delaware's regulatory authority over cross-boundary projects. *See* DA 4685-4711 (BP Privilege Log). Internal BP documents show that BP representatives communi-

cated more than 250 times with New Jersey in 2005-2006 regarding New Jersey's pleadings in this case. *See id.*

Although New Jersey has never issued the required New Jersey permits for Crown Landing to be built, it filed this suit invoking the Court's original jurisdiction. The Court appointed Ralph I. Lancaster, Jr., as Special Master, who conducted an intensive nine-month discovery process. *See* Rep. 27. After the close of discovery, both sides moved for summary judgment. The parties submitted nearly 6,500 pages of historical documents, correspondence, reports, and other materials, which the Master "read and digested" along with more than 200 pages of briefing. Oral Arg. Tr. 4 (Feb. 22, 2007).

The Master heard nearly four hours of oral argument on February 22, 2007, and issued his Report on April 12, 2007, concluding that New Jersey's authority to convey riparian lands stops at the low-water mark on the New Jersey shore. He found that the 1905 Compact preserves for riparian owners on the New Jersey shore their riparian rights, including the right to wharf out into Delaware territory. He concluded that, beyond the low-water mark, New Jersey could not exercise the full extent of its police powers or exercise "exclusive jurisdiction," and that, beyond the low-water mark, Delaware, "as the sovereign," has "overlapping jurisdiction to exercise its full complement of police powers to regulate riparian improvements extending from New Jersey's shore." Rep. 2.

The Master reasoned that New Jersey's authority to grant *lands* is limited by the boundary that this Court established in *New Jersey II*, because a State may not grant away lands to which it does not hold title. *See* Rep. 33, 42-46. By contrast, he reasoned that Article VII of the Compact preserved New Jersey's ability to grant riparian *rights* appurtenant to its own shore and beyond the boundary, because riparian rights commonly may be exercised on submerged land not owned by the riparian owner. *See* Rep. 33, 46-51. The Master concluded, however, that, even if New Jersey had jurisdiction to regulate riparian

rights associated with improvements extending from the New Jersey shore into Delaware territory, Delaware had police power jurisdiction over such improvements. *See* Rep. 52-86. That conclusion followed from an examination of this Court's cases and the two States' history of regulation. The Master's decree proposes that the "State of Delaware may exercise, under its laws, full police power jurisdiction over the construction, maintenance and use of . . . wharves and other improvements appurtenant to the eastern shore of the Delaware River within the twelve-mile circle insofar as they extend outshore of the low water mark onto its sovereign territory." Rep., App A.

SUMMARY OF ARGUMENT

I. The Special Master correctly found that New Jersey may not make grants of Delaware's submerged lands. Article VIII of the 1905 Compact codifies the longstanding rule that a sovereign will not be deemed to have granted away such lands unless it does so expressly. This Court has already held that Article VII of that Compact did not give New Jersey territorial rights in Delaware's submerged lands, and Article VIII confirms that interpretation. Article VII does no more than give each State power to grant lands that it owns, and it does not give New Jersey power to grant lands within Delaware's territory. If it did, New Jersey would be able unilaterally to change the interstate boundary set by this Court in 1935 every time it made a riparian grant beyond the low-water mark in the twelve-mile circle. This Court's boundary decision, the historical context, and the structure of the 1905 Compact provide no support for that cession of Delaware's territorial rights to New Jersey. New Jersey relies on an incorrect assumption that the Compact's reference to each State's "own side of the river" refers to the geographic half of the Delaware River adjacent to each State's shore, a position rejected by this Court when it determined that the relevant dividing line is not the river's geographic middle but the low-water mark on the eastern side.

II. The Master correctly found that Delaware retains police power jurisdiction within its territory. Riparian rights have always been subject to the sovereign's power to regulate for public safety and welfare. The New Jersey commissioners drafting the 1905 Compact were familiar with that principle, because New Jersey's Attorney General recognized it in an 1867 opinion. In enforcing its Coastal Zone Act, Delaware is lawfully exercising police powers within its sovereign territory. The DCZA is a classic exercise of the power to protect public health, safety, and lands. Moreover, Delaware has an undisputed right to regulate activity on ships within the twelve-mile circle.

New Jersey's exceptions lack merit. "Riparian jurisdiction," as used in Article VII, neither means "exclusive jurisdiction" nor confers broader police powers. New Jersey mistakenly argues that enforcement of any law affecting riparian rights constitutes an exercise of riparian jurisdiction, but that argument is not true to precedent distinguishing riparian law from general regulatory law. New Jersey also argues that it would be unworkable for Delaware to have police power jurisdiction over riparian improvements extending from New Jersey, but Delaware and New Jersey have worked together cooperatively to regulate such improvements for decades with no apparent administrability problems. Such overlapping jurisdiction over cross-boundary structures is common, as New Jersey itself asserted (and this Court agreed) in *New Jersey v. New York*, 523 U.S. 767 (1998). And the States' course of conduct since 1905 confirms that Delaware retains sovereignty and police power jurisdiction over riparian improvements located in Delaware's territory. Delaware's regulation of its coastal waters and submerged lands has long encompassed such structures, and New Jersey has consistently submitted to such regulation. New Jersey relies on statements made by Delaware at the time of the Compact, but the cited statements are consistent with Delaware's exercise of its police powers to regulate improvements in Delaware.

ARGUMENT

I. THE MASTER CORRECTLY FOUND THAT NEW JERSEY MAY NOT GRANT DELAWARE LANDS

This Court has long recognized the bedrock legal principle that control of submerged lands lies in the hands of the sovereign. The 1905 Compact codifies that foundational tenet in Article VIII, which provides that the Compact will not affect the States' territorial rights except as "expressly set forth" in the Compact. The Master correctly found that Article VII does not contain such an express grant of Delaware lands to New Jersey. Indeed, a contrary holding would override this Court's resolution of the boundary dispute in *New Jersey II*, which squarely rejected the argument that Article VII gave New Jersey territorial rights over submerged land within the twelve-mile circle:

> We are told that by [the 1905 Compact] the controversy was set at rest and the claim of Delaware abandoned. It is an argument wholly without force. The compact of 1905 provides for the enjoyment of riparian rights, for concurrent jurisdiction in respect of civil and criminal process, and for concurrent rights of fishery. Beyond that it does not go. "Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth."

291 U.S. at 377-78 (quoting Article VIII).

A. The 1905 Compact Codifies The Bedrock Principle That A Sovereign State Has Exclusive Jurisdiction To Grant Its Own Lands

This Court has long recognized the fundamental principle that a sovereign State has exclusive jurisdiction to grant and convey its own lands, including submerged lands. *See, e.g., Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 733 (1838) ("[W]hen a place is within the

boundary, it is a part of the territory of a state; title, jurisdiction, and sovereignty, are inseparable incidents, and remain so till the state makes some cession."); *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878) ("the laws of one State have no operation outside its territory, except so far as is allowed by comity"); *United States v. Alaska*, 521 U.S. 1, 5 (1997) ("Ownership of submerged lands – which carries with it the power to control navigation, fishing, and other public uses of water – is an essential attribute of sovereignty."). Accordingly, the Court has held that, when a State has granted property later found to be outside its lawful boundary, the grant is invalid. *See, e.g., Coffee v. Groover*, 123 U.S. 1, 29 (1887) (discussing the rule in *Poole v. Lessee of Fleeger*, 36 U.S. (11 Pet.) 185 (1837), "that the grants of North Carolina and Tennessee were not rightfully made, because they were originally beyond their territorial boundary").

A State must use unmistakable language to cede its territorial rights. *See United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987) ("[A] waiver of sovereign authority will not be implied, but instead must be surrendered in unmistakable terms."); *United States v. Texas*, 162 U.S. 1, 68 (1896) ("vague forms of expression" do not suffice to relinquish sovereignty). Because "[t]he dominion over navigable waters and property in the soil under them, are so identified with the exercise of sovereign powers of government," "a presumption against their separation from sovereignty must be indulged." *Massachusetts v. New York*, 271 U.S. 65, 89 (1926). *See also Stevens v. Paterson & Newark R.R. Co.*, 34 N.J.L. 532, 1870 WL 5140, at *10 (N.J. 1870) (New Jersey law recognizes same principle).[14]

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[14] New Jersey asserts that this Court's cases stand for the principle that this presumption against cession of sovereign rights does not apply when a compact resolves issues between States. *See* NJ Br. 26-27 (citing *New Jersey v. New York*, 523 U.S. at 811; *Texas v. New Mexico*, 482 U.S. 124, 128 (1987)). But the cases it cites do no more than hold that the Court must interpret the Compact as it would a statute, *e.g.*, *New Jersey v. New York*, 523 U.S. at 811 – a mandate that, in this case,

As the Court held in *New Jersey II*, the 1905 Compact codifies that bedrock principle in Article VIII's requirement that any concession be "expressly set forth." *See* 291 U.S. at 377-78. An "express" concession must be "[m]ade known distinctly and explicitly, and not left to inference or implication." DA 4748 (*Black's Law Dictionary* 462 (1891)). This Court's resolution of the boundary dispute "subject to the Compact of 1905," 291 U.S. at 385, thus cannot give New Jersey territorial rights in Delaware unless the Compact expressly conferred such rights – and it did no such thing.

B. Article VII Gives New Jersey No Right To Grant Delaware Lands

The text of Article VII – that "[e]ach State may, on its own side of the river, continue . . . to make grants, leases, and conveyances of riparian lands" – contains no "express" or "unmistakable" relinquishment of title to riparian lands by either State. On the contrary, the text is most naturally read to permit each State to make grants only of land that it "own[s]." As the Master recognized, no evidence suggests that the drafters intended Article VII to permit one State to make grants of riparian land owned by the other State. *See* Rep. 40-46. Indeed, New Jersey has conceded that the Compact did not give it any ownership rights in Delaware land. *See* NJA 309a, 312a (N.J. Att'y Gen., Formal Op. No. 22) (the Compact "gave the State of New Jersey no proprietary rights in the

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requires the Court to interpret Article VII in the context of the Compact as a whole. The cases cited by New Jersey also did not involve provisions such as Article VIII in the 1905 Compact, which expressly incorporates the doctrine as a provision of the Compact. Moreover, New Jersey nowhere contests the applicability of this Court's holding in *Coffee v. Groover* that a State's grant of title to lands later found to be outside the State's boundary would be invalid. The holding of *Coffee* in the decades prior to the 1905 Compact – coupled with Article VIII's express language – more than amply demonstrates the applicability of the presumption against cession of jurisdictional rights in this situation.

soil within the twelve-mile circle," and "New Jersey has no ownership in the soil offshore of said low-water mark").

The Master also correctly found that, if Article VII allowed New Jersey to make grants of Delaware riparian lands, New Jersey could grant away from Delaware the title to all lands between the low-water mark and the middle of the river. *See* Rep. 45. This Court's own reading of the Compact, *see New Jersey II*, 291 U.S. at 377-78, rejects that very approach. Yet New Jersey's theory (at 23-24) requires the Court to read its 1934 decision "subject to the Compact of 1905," 291 U.S. at 385, to mean that the Compact permits New Jersey to alter the interstate boundary unilaterally whenever it decides to make a grant of riparian land on the eastern half of the river. The Master rightly found incredible New Jersey's suggestion that "this Court implicitly gave New Jersey the right to transfer title to lands that the Court had just concluded belonged to Delaware." Rep. 45.[15]

The structure and text of the 1905 Compact confirm the Master's interpretation. In Articles I-IV, each State received specific rights within geographically delineated areas of the disputed territory, including the right to serve process between the low-water marks on each shore and a common right of fishery within the disputed territory. Article IV gave each State "exclusive jurisdiction within said river" to enforce the concurrent fishing laws against its own inhabitants, regardless of which State's claim to the territory might later be upheld. In Articles V and VI, neither State received any rights it did not already have by virtue of the boundary. In this context, the Master correctly declined to find that Delaware, in Article VII, received nothing in exchange for New Jersey receiving the right to convey lands within the disputed

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[15] As the Master noted, at oral argument New Jersey conceded that its position was that "it has the authority to grant title to subaqueous lands west of the low water mark simply because this Court's 1935 Decree made the location of the boundary 'subject to the Compact of 1905.'" Rep. 45; *see also* Oral Arg. Tr. 19-22.

territory from the middle of the river to the low-water mark on the New Jersey shore. Nothing in this structure supports reading Article VII alone among the Compact's provisions to be a one-way street favoring New Jersey.[16]

Use of the word "continue" in Article VII to describe what the States may do further indicates that the Compact's drafters did not intend to convey either State's sovereign authority over its lands to the other State or to create new territorial rights. "Continue" means "[t]o remain in a given place or condition," while "exercise" means "[t]o put into practice" or "to use." DA 4195, 4197 (*Webster's International Dictionary* 314, 524 (1898)). Thus, the "may continue to exercise" language of Article VII does not effect a permanent *transfer* of sovereign rights from one State to the other.[17] Instead, Article VII preserved the status quo, at most grandfathering the small number of existing structures in the disputed territory so that those landowners would be protected from later claims of trespass or purpresture without reflecting any intention to surrender to New Jersey sovereign ownership of or exclusive jurisdiction within Delaware territory.[18]

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[16] Article VII's location within the Compact provides further support for Delaware's reading and the Master's conclusion that New Jersey cannot grant away the submerged lands of Delaware. Articles I-IV confer on each State certain rights concerning service of process and fishing regardless of where the boundary was to be fixed. Articles V and VI, however, indisputably gave neither State any territorial rights they did not already have on their respective sides of the boundary. Sandwiched between those Articles and Article VIII's reservation of rights, Article VII is best read as reserving each State's rights within its territory.

[17] By contrast, Article III provides that each State's inhabitants "*shall have and enjoy* a common right of fishery," and Article IV provides that each State "*shall have and exercise* exclusive jurisdiction within said river" to enforce concurrent fishing laws once enacted (emphases added). *See* DE SJ Br. 36-37 (discussing cases on "shall have" formulations in compacts as means of conferring permanent rights).

[18] Before the Master, New Jersey identified only three riparian structures built pursuant to its pre-1905 grants. *See* NJ Br. 4-5 & n.4.

The Compact's history further supports the Master's conclusion that Article VII does not give New Jersey the right to convey Delaware lands. For centuries, Delaware and New Jersey had disputed the land between the low-water mark on the New Jersey shore and the middle of the river. The States negotiated the 1905 Compact against the backdrop of two centuries of unsuccessful challenges to Delaware's title, and two notable decisions had vindicated Delaware's claim of title. *See supra* note 2. Against that backdrop, there was no reason to believe that Delaware agreed in Article VII to cede its territorial rights within the twelve-mile circle.

C. New Jersey's Exceptions Are Unpersuasive

1. *Virginia v. Maryland* is inapposite

Throughout this litigation, New Jersey has contended that *Virginia v. Maryland*, 540 U.S. 56 (2003), supported its entitlement to grant away Delaware's submerged lands. Special Master Lancaster – the same master whose recommendations were accepted by this Court in *Virginia v. Maryland* – properly found New Jersey's arguments unpersuasive. New Jersey contends (at 24-27) that no presumption against defeat of a State's title applies, because Delaware's title was disputed at the time of the Compact. *See also* BP Br. 12-13. That argument fails because Article VIII of the 1905 Compact made the presumption against forfeiture of jurisdictional powers binding upon both States. *See supra* pp. 18-20. The 1785 Virginia-Maryland Compact contained no such provision.

The Master also correctly rejected New Jersey's reliance on *Virginia v. Maryland* because of critical differences in "the unique language of the compact and arbitration award involved in that case." Rep. 64 n.118. The 1785 Compact between Virginia and Maryland provided that "'[t]he citizens of each state respectively shall have full property in the shores of the Potowmack river

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Two of those structures were inconsequential, and none was inconsistent with Delaware common law. *See* DA 4453.

adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river.'" 540 U.S. at 66 (quoting Article Seventh). Examining the various provisions of that compact, the Court observed that the Article Seventh "privilege of making" wharves by the "citizens of each state" "was not explicitly subjected to any sovereign regulatory authority," whereas the fishing right in Article Eighth "was subjected to mutually agreed-upon regulation." *Id.* at 66-67; *see also id.* at 67 ("Other portions of the 1785 Compact reflect this design."). The Court found "that these differing approaches to rights" "indicate that the drafters carefully delineated the instances in which the citizens of one State would be subject to the regulatory authority of the other." *Id.*

As the Master explained, the 1905 Compact contains no "comparably clear language" giving New Jersey jurisdiction that encompassed all regulatory oversight or was exclusive of Delaware's jurisdiction. Rep. 65 n.118.[19] The 1785 Compact also declared that Virginia residents "shall have" jurisdictional rights, in contrast to the "may ... continue" language of Article VII, and it did not limit the privilege of building wharves and improvements to each State's "own side" of the river, as does the 1905 Compact. Finally, *Virginia v. Maryland* did not concern the conveyance of another State's land to a private party, such as New Jersey wishes to effect here by granting portions of Delaware to BP.

New Jersey asserts (at 26) that the Master misread Article VIII and mistakenly insisted on "heightened clarity."

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[19] BP argues (at 11) that the documents in *Virginia v. Maryland* contained no reference to "riparian jurisdiction," yet granted Virginia exclusive jurisdiction over riparian structures extending across the boundary, free from Maryland's regulation. The Master, however, correctly found the 1905 Compact's reference to "riparian jurisdiction" to limit each State's jurisdiction to the granting of riparian rights, rather than to impair police powers to regulate activities generally.

But he merely applied Article VIII's plain language to conclude that Article VII could not affect Delaware's territorial rights unless it expressly so provides, which it does not. New Jersey substantially ignored Article VIII in briefing before the Master and now does not even attempt to show that Article VII contains an "express" concession by Delaware to confer authority on New Jersey to grant riparian lands within Delaware territory.

2. New Jersey's symmetry arguments lack merit

New Jersey claims (at 40) that the Compact is organized in a "rigorously symmetrical" fashion and that the Master's reading must be wrong because it gives Delaware the power to control riparian development from the New Jersey shore, while New Jersey does not have the power to control development from the Delaware shore. Reading the Compact, as the Master did, to give each State authority over lands within its own boundary is "symmetrical." The axis of symmetry is the boundary between the States and not, as New Jersey would have it, a line down the middle of the river – a line that this Court determined has no legal significance within the twelve-mile circle. New Jersey may control development in its territory, from its shore up to the low-water mark (its "own side"), and may assert jurisdiction over developments from the Delaware shore that extend into New Jersey territory. But neither State may control development in the other's territory.[20]

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[20] The Master misunderstood Delaware to be arguing that, because the river up to the low-water mark is on Delaware's side of the boundary, New Jersey "has no 'side' of the River on which to exercise any riparian rights or riparian jurisdiction." Rep. 36. On the contrary, Delaware has always agreed with the Master that, "after [*New Jersey II*], New Jersey still owns down to the easterly low water mark." "[s]o New Jersey still has a side." *Id.* That side includes "not only an 'edge' or 'border' along the River . . . . but also a portion of the River itself, between the low and high water marks." Rep. 37-38 n.82. New Jersey thus may grant riparian lands and riparian rights extending up to that mark.

In the same vein, New Jersey argues (at 31-32) that the Compact accords "equal grants of jurisdiction to the parties," citing Articles I and II, which give New Jersey jurisdiction over the "eastern half" of the river and Delaware jurisdiction over the "western half." But those Articles illustrate that the drafters were perfectly capable of permitting each State to exercise jurisdiction in a particular geographical area, something they chose *not* to do in Article VII. *See supra* pp. 4-6.

New Jersey also argues (at 31) that the Court need not interpret the Compact to equalize the burdens and benefits of a contractual provision. But that argument contradicts its assertion (at 40) that the Compact is "rigorously symmetrical." In any event, Delaware's commissioners had no reason to give New Jersey sovereignty over disputed lands within the twelve-mile circle without receiving anything in return. *See supra* pp. 21-23.

3. Article IX does not support New Jersey

Nothing in Article IX, which provides that the Compact would "become binding in perpetuity upon both of said States," supports New Jersey's position. Article IX neither increases nor decreases the scope of the provisions in the eight substantive Articles of the Compact; it merely provides that the Compact as a whole will be binding in perpetuity, as opposed to expiring at any given time. In the same sentence, Article IX also states that, upon ratification, the litigation between the States "shall be discontinued . . . without prejudice." Taken together, the two clauses mean that the Compact as a whole shall be binding and that the rights reserved therein shall be preserved for litigation at a later date if necessary. Given the States' decisions in Articles I-IV to confer jurisdiction on each other irrespective of the ultimate boundary determination, the existence of Article IX – making the agreement "binding in perpetuity" – sheds no light on the meaning of those Articles (V, VI & VII) that expressed no intent to surrender to New Jersey for all time jurisdiction

over riparian structures that were conclusively determined to fall within Delaware's boundary.

4. New Jersey's assumption that "side" means "half" of the river is flawed

For the most part, New Jersey is careful to avoid defining its "own side" of the river as the eastern half. Yet the only way New Jersey can prevail in this lawsuit is for its "own side" to extend past the boundary line, and the only way for its theory of riparian jurisdiction to achieve its objective of permitting BP to construct its LNG bulk transfer facility is for the extension of its "side" to go all the way to the navigable channel in the middle of the river. *See* Oral Arg. Tr. 11, 19-21, 57-58; NJ Br. 32 (arguing that its authority "to make the necessary grants of riparian rights and lands past the low water mark" must override Delaware's "police power on the eastern half of the river"). That position, however, was explicitly rejected by this Court in connection with the boundary decision of 1934. *See New Jersey II*, 291 U.S. at 385.

At the time of the Compact, courts, legislatures, and litigants referred specifically to the "middle of the river" or used similar language when they wanted to designate a river's geographical half, rather than referring merely to a State's "own side" without defining the limits of that "side." For example, in *New Jersey I*, New Jersey repeatedly referred to the "middle" of the river, or "easterly" of the "middle" of the river, in its boundary claims. *See* DA 20 (1877 Complaint). Similarly, during the hearings conducted by the Court-appointed commissioner, New Jersey's Attorney General Robert McCarter – one of the 1905 Compact's negotiators – asserted that New Jersey owns "the bed of the Delaware River East of the middle line thereof." DA 1141; *see also* DA 1143 ("[s]uch claim to the centre of the river"). Those usages are consistent with the way each State's statutes had asserted title. New Jersey statutes provided that "the boundary lines of the counties of Salem, Cumberland and Cape May, are hereby declared to be the main ship channel of the river and bay of

Delaware adjoining said counties respectively." DA 859 (1821 N.J. Laws p. 6, § 1). Delaware used similarly precise language, defining Delaware's boundary as the "low-water mark on the eastern side of the river Delaware within the twelve-mile circle from New Castle." Revised Code of Delaware, 1874, ch. 1, § 2.

Numerous pre-1905 cases from New Jersey likewise referred to the "middle" of a river to denote a boundary between New Jersey and other States, rather than using a phrase such as "own side of the river" to denote jurisdiction or title all the way to the middle of a river.[21] The same is true of the 1834 New Jersey-New York Compact, which was the subject of much litigation at the turn of the 20th century.[22] As the Master found, the textual evidence shows that the 1905 Compact borrowed language from the 1834 Compact.[23] The 1834 Compact had used precise phrases to describe the geographic scope of each State's jurisdiction. The 1905 Compact used similar precision in certain Articles, but not in Article VII.

Given that textual, historical, and comparative evidence, Article VII's reference to each State's "own side of

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[21] *See, e.g.* (all emphases added): *New York, Lake Erie, & W.R.R. Co. v. Hughes*, 17 Vroom 67, 1884 WL 7630, at *2 (N.J. Sup. Ct. 1884) ("*middle of the Hudson river*"); *Lehigh Valley R.R. Co. v. Mutchler*, 13 Vroom 461, 1880 WL 7765, at *2 (N.J. Sup. Ct. 1880) (taxation "for that part of its bridge over the Delaware river [from Pennsylvania and New Jersey] which is *east of the middle line of the river*"); DE SJ Br. 33 n.39 (numerous additional cites).

[22] *See, e.g.* (all emphases added): DA 886-87 (Arts. 3(1) ("exclusive right of property in and to the land under water lying *west of the middle* of the bay of New York"), 3(3) ("exclusive right of regulating the fisheries on the *westerly side of the middle* of the said waters"); *Central R.R. Co. v. Mayor of Jersey City*, 56 A. 239, 243 (N.J. Sup. Ct. 1903) ("Article 1, in clear and explicit language, fixed the boundary line between the states as the *middle of the Hudson river* and of the Bay of New York."), *aff'd*, 61 A. 1118 (N.J. 1905) (per curiam), *aff'd*, 209 U.S. 473 (1908).

[23] *See* Rep. 65-68 & App. J (table comparing 1834 and 1905 compact provisions).

the river" does not refer to the geographic half of the river adjacent to each State's shore, but to the "side" owned by each State. As the Master correctly concluded, New Jersey's "side" of the river consists of the land along its shoreline as well as the "portion of the River . . . between the low and high water marks." Rep. 37 n.82. New Jersey is free to grant riparian lands and rights within its territory, but it may not grant lands located in Delaware's territory, and any *rights* it grants beyond its territory are subject to Delaware's regulation.[24]

II. DELAWARE MAY EXERCISE POLICE POWER JURISDICTION OVER RIPARIAN IMPROVEMENTS LOCATED IN DELAWARE

Even if the 1905 Compact grants New Jersey *riparian* jurisdiction that extends into Delaware territory, the Master correctly found that Delaware retains territorial rights and police power jurisdiction within its own territory. Riparian jurisdiction – *i.e.*, jurisdiction to grant and define riparian rights – has always been subject to the sovereign's exercise of its police powers. This Court has

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[24] The Master found that New Jersey may grant riparian *rights* (as opposed to land) extending into Delaware, because riparian owners' *rights* (to wharf out, etc.) may extend over land that they do not own. Although that recommendation is inconsistent with the notion that a State's sovereignty extends throughout its territory, the Master's recommended finding lacks practical effect. As the Master correctly determined, any such rights are always subject to the sovereign's exercise of its police powers. *See* Rep. 33-34, 51-86; *see also infra* Part II. Moreover, as a practical matter, all cross-boundary riparian rights are currently governed by separate agreements between the parties, or by federal law, or are now obsolete. For example, even within the Compact itself, fishing rights would be governed by the more specific provisions of Article V, while discharges and withdrawals of water are governed by the interstate Delaware River Basin Commission's permitting process and by federal regulations, *see* DA 4319-20 (Hansen Aff. ¶¶ 2-4) (describing Environmental Protection Agency and DRBC discharge rules); Delaware River Basin Water Code (Aug. 14, 2007), *available at* www.state.nj.us/drbc/regs/watercode_092706.pdf. Ice-cutting on the Delaware River is obsolete, and the record indicates no disputes over bathing in the river.

recognized the distinction between riparian rights and territorial rights in the 1905 Compact, emphasizing that the Compact provided for "the enjoyment of *riparian* rights" without going "[b]eyond that" to "'affect the *territorial* limits, rights, or jurisdiction of either State.'" *New Jersey II*, 291 U.S. at 377-78 (quoting Art. VIII) (emphases added). Thus, even if New Jersey could authorize a wharf to be built into Delaware's territory, Delaware retains police power to regulate activities on that wharf. New Jersey's argument that Article VII grants it "exclusive" jurisdiction to regulate wharves on Delaware territory is unpersuasive for a number of reasons, principally because it improperly substitutes "exclusive" for "riparian" in the phrase "riparian jurisdiction."

A. Riparian Rights Are Subject To The State's Exercise Of Its Police Powers

1. The Master correctly interpreted the phrase "riparian jurisdiction" in the context of riparian rights. *See* Rep. 46-47. Although both States acknowledge that "riparian jurisdiction" was not an acknowledged term in 1905, riparian rights were well-defined. They included rights to access navigable waters and to use waters appurtenant to riparian property, subject to the police power. *See* 1 *Farnham* 279-80. As the Master concluded, the adjective "riparian" as applied to "jurisdiction" cannot be stripped of the meaning that it has when modifying "rights." Article VII's reference to "riparian" jurisdiction indicates that this jurisdiction relates to the oversight and exercise of riparian rights, not that it is an exclusive grant to one State of police powers to be exercised within the territory of the other State. *See* Rep. 55-58. And, indeed, New Jersey implicitly concedes as much (at 32-33) when it defines "riparian rights" without contending that such rights negate a State's typical police powers.

Riparian rights are private rights or privileges associated with property. *See, e.g.*, 1 *Farnham* 302 ("the riparian right of access to the water was property"). Thus, "the owners of land abutting on bodies of water are accorded

certain rights by reason of their adjacency which are *different from those belonging to the public generally*." *Id.* at 278 (emphasis added). But those private property rights, including the right of shoreline property owners to access the navigable portion of a river, have always been "subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be." *Yates v. City of Milwaukee*, 77 U.S. (10 Wall.) 497, 504 (1871); *see also Weber v. Board of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 64-65 (1873); Restatement (Second) of Torts § 856 cmt. e (explaining that, absent "conflict with federal action or policy," "a state may exercise its police power by controlling the initiation and conduct of riparian and nonriparian uses of water"). New Jersey likewise followed those principles.[25]

After the exercise of legitimate rights by the riparian owner, "there remains a residuum of common or public ownership that, under our system, rests in the state as a trustee for all the people." *McCarter v. Hudson County Water Co.*, 65 A. 489, 496 (N.J. 1906), *aff'd*, 209 U.S. 349 (1908) (Holmes, J.); *see also Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435, 1882 WL 2713, at *10 (1882) ("[R]iparian rights are always subject to the state regulation."). Riparian rights "are always subordinate to the public rights, and the state may regulate their exercise in the interest of the public." 1 *Farnham* 284. The right to wharf out is likewise subject to the exercise of police powers. *See Yates*, 77 U.S. at 504 ("[t]his riparian right is property, and is valuable, and . . . must be enjoyed in due subjection to the rights of the public").

2. New Jersey's 1905 Compact commissioners would have recognized the sovereign's police power to restrict private riparian rights to protect the public safety. An

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[25] *See, e.g., Gough v. Bell*, 22 N.J.L. 441, 1850 WL 4394, at *17 (N.J. Sup. Ct. 1850) (Green, C.J.), *aff'd*, 23 N.J.L. 624, 1852 WL 3448 (N.J. 1852); *see also* New Jersey cases cited at DE SJ Br. 50 n.58.

1867 New Jersey Attorney General opinion concluded that, under New Jersey law, riparian rights were "'confined to uses naturally incidental to the right to occupy the shore, such as the right of passage and landing, of egress and ingress to and from, and the general use of the docks and wharves.'" Rep. 59 (quoting DA 909 (N.J. Att'y Gen., Op. Concerning Riparian Rights)). The opinion found that such rights "were not absolute, but rather were subject to varying degrees of regulation by the State," which retained the power to override "riparian rights for 'public uses,'" including "'the essential interests of governmental strength and public safety.'" *Id.* (quoting DA 910).

According to that same opinion, the State could also regulate riparian rights for other public purposes, including turnpikes and railroads, but in such cases the State would have to exercise its eminent domain powers and compensate the riparian owner. *See* Rep. 60. Thus, the sovereign could restrict the location of a pier if a public turnpike required doing so, but just compensation would be due the riparian owner. When the State's regulation impaired the riparian right for a public safety purpose, no compensation was required. *See id.* In view of that history of riparian rights, "riparian jurisdiction" means the State's jurisdiction to define the scope of and to grant the special private rights that are unique to riparian proprietors and that are not shared by the public at large. *See* DA 909 ("rights of the 'riparian owner' are not *common* rights . . . [but] *private* rights"). The public's rights have never been considered to be riparian rights. Accordingly, the scope of riparian jurisdiction in Article VII is defined by the scope of those private riparian rights – such as the right to wharf out to access navigable waters – and does not alter in any respect the public's rights in those waters or submerged lands. New Jersey's compact drafters – two of whom had been New Jersey Attorneys General – would have been familiar with their predecessor's detailed opinion on the ability of state power to override riparian rights in New Jersey. *See* Rep. 61.

New Jersey attempts (at 38) to minimize the import of the 1867 opinion, arguing that it was "superseded" two years later by a new statutory scheme, but its argument misses the point. The 1867 opinion addressed the fundamental relationship between the rights of riparian owners and the powers of the sovereign that owns "the lands covered by the navigable waters." DA 906. That opinion established the legal principles pursuant to which the subsequently enacted statute – which did *not* amend the Attorney General's opinion, but rather implemented the State's powers as described in that opinion – could operate. The 1867 opinion authoritatively illuminates what New Jersey's chief legal officer understood to be the contours of riparian jurisdiction prior to the 1905 Compact's drafting – and New Jersey's interpretation of the Compact now cannot be squared with that opinion.

B. Delaware Seeks To Exercise Its Police Powers

1. Delaware's Coastal Zone Act is a classic exercise of police powers. Regulating emissions into and activities on a sovereign's water "clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960). The DCZA carries out Delaware's overarching authority to protect public health and safety and "to protect the atmosphere, the water, and the forests within its territory," *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908), by prohibiting additional bulk transfer facilities in its coastal zone. In accord with *Hudson County*'s holding on the permissible scope of police powers, the DCZA's legislative purpose is "to control the location, extent and type of industrial development in Delaware's coastal areas" to "better protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism." Del. Code Ann. tit. 7, § 7001. That functional prohibition of certain activities on riparian improvements does not make it a riparian law or an exercise of riparian jurisdiction. *See Cummings*, 188 U.S. at 426-

27 (distinguishing between federal riparian permission and state police powers).

New Jersey claims (at 40) that allowing Delaware to determine what may be unloaded on cross-border wharves threatens New Jersey's ability to promote commerce, and thus could not have been contemplated by the Compact's drafters. But New Jersey offers no evidence the drafters intended to confer on *New Jersey* exclusive authority over activities in Delaware that threaten Delaware's ability to protect its citizens' health and safety. In any event, Delaware seeks no advantage over New Jersey – the same laws preclude BP's activities throughout Delaware's coastal territory.[26]

2. Even if New Jersey somehow had a right to prevent Delaware from exercising its police powers with respect to a wharf on Delaware territory, Delaware unquestionably may regulate ships outshore of the low-water mark within the twelve-mile circle. The DCZA prohibits bulk transfers from ships as well as from wharves. *See Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985) (holding that the DCZA applies to vessel-to-vessel transfers as well as to vessel-to-shore transfers, and noting that "[t]he danger of pollution and industrialization to the Delaware Coast is the same"). Delaware

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[26] *See Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 406-07 (3d Cir. 1987) (upholding the DCZA against a Commerce Clause challenge because Delaware applies its coastal zone laws even-handedly throughout the river). BP suggests incorrectly (at 1-3) that FERC has determined BP's project should be built at the proposed site. In fact, BP is currently assessing other potential locations outside the twelve-mile circle, and thus outside of Delaware's regulatory purview. FERC has elected not to file an *amicus* brief supporting BP in this case, thus suggesting that Crown Landing's preferred site in Delaware is not important to the agency. Moreover, FERC recently emphasized to the D.C. Circuit that its approval of the Crown Landing project was "conditional, but not final," pending further approvals, including Delaware's approval. *See* Motion of Respondent FERC To Dismiss or Alternatively To Hold in Abeyance Petition for Review at 1, 5, *Delaware DNREC v. FERC*, No. 07-1007 (D.C. Cir. filed Mar. 1, 2007).

has the right (subject to applicable federal laws) to impose pilotage requirements for vessels passing through its waters and to impose regulations on vessels tied to wharves on Delaware territory. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 159-60 (1978) (discussing local pilotage rules); *Huron*, 362 U.S. at 441-42 (holding that local smokestack ordinance applied to ships in port). Delaware's denial extended to the portion of BP's proposed bulk transfer facility piping on the supertankers from which the LNG would be offloaded. *See* DA 3804. That denial cannot violate the 1905 Compact, because regulating ship-board activities is not "riparian jurisdiction."

The 1834 New Jersey-New York Compact distinguished between jurisdiction over wharves and authority over ships fastened to them, providing that "New Jersey shall have the exclusive jurisdiction of and over the wharves, docks, and improvements, made and to be made on the shore of the said state; and of and over all vessels aground on said shore, or fastened to any such wharf or dock." DA 887 (Art. 3(2)). Article I of the 1905 Compact permits New Jersey to serve process on a ship fastened to a wharf emanating from New Jersey but does not permit New Jersey to exercise other forms of jurisdiction over ships. The 1905 Compact thus did not diminish Delaware's power to regulate the activities of ships within its waters, even if the ships dock at a wharf that crosses the border from New Jersey into Delaware.

C. New Jersey's Exceptions Lack Merit

1. "Riparian" is not "exclusive" jurisdiction

The Master correctly found that "riparian jurisdiction" does not mean "exclusive jurisdiction." Rather, the word "riparian" is a "limiting modifier" on the term "jurisdiction," such that the phrase "riparian jurisdiction" cannot be read to confer "broader police powers to regulate all activities that might be conducted on riparian improvements" that cross the boundary line. Rep. 57.

The Master interpreted Article VII in light of the 1905 Compact as a whole and other compacts to which New Jersey was a party. *See* Rep. 62-68. The 1905 Compact used the word "exclusive" only in Article IV, and then only to give each State "exclusive jurisdiction within said river to arrest, try, and punish its own inhabitants" for violating fishing laws. Had the drafters intended to give New Jersey exclusive jurisdiction over riparian improvements extending into Delaware, and to forbid Delaware from exercising its police powers over such structures, they could have used the term "exclusive" in Article VII.[27] Similarly, the 1834 New Jersey-New York Compact – on which the 1905 Compact's drafters clearly drew – confirms that New Jersey specified when it intended jurisdiction to be exclusive. That compact gave New York "exclusive jurisdiction" over the waters and New Jersey "exclusive jurisdiction" over wharves (subject to New York's health and quarantine laws). *See* Rep. 66-67 & App. J.[28]

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[27] New Jersey argues (at 27) that Article VII grants "*exclusive* jurisdiction to each State on its side of the river, not . . . shared jurisdiction." But "exclusive" jurisdiction on New Jersey's "own side of the river" is not exclusive jurisdiction in Delaware. *See supra* pp. 27-29.

[28] The 1783 Compact between New Jersey and Pennsylvania gave the two States "concurrent" jurisdiction over the waters of the Delaware River between their shores, but provided that certain vessels would be "exclusively within the jurisdiction" of one State or the other, depending upon the vessel's location. *See* DA 4403 (Art. II).

The "exclusive" language in the 1834 Compact between New Jersey and New York proved determinative in subsequent litigation. *See New York v. Central R.R. Co. of New Jersey*, 42 N.Y. 283, 304 (1870) (holding that New Jersey's "exclusive jurisdiction" over wharves precluded New York from asserting jurisdiction over such structures for purposes of declaring them a nuisance). Nonetheless, even New York's "exclusive jurisdiction" over certain submerged lands and water to the low-water mark on the New Jersey side of the Hudson River – which the Compact declared were owned by New Jersey – could not interfere with New Jersey's right, as the sovereign owner of those lands and water, to tax them. *See Central R.R.*, 56 A. at 243-44.

New Jersey next relies (at 30) on the fact that Article VII gives it "riparian jurisdiction of every kind and nature." But that phrase is best understood as jurisdiction over all types of riparian rights, from fishing and bathing to water extraction and wharfing out. New Jersey's reading would drop the modifier "riparian" and transform the phrase into "*jurisdiction* of every kind and nature." A State may exercise jurisdiction over all types of riparian rights without impairing an adjoining State's exercise of non-riparian jurisdiction. *See infra* pp. 39-41. Moreover, New Jersey has presented no evidence that, before this case, it ever sought to assert exclusive jurisdiction over wharves extending into Delaware. *See* DE SJ Reply Br. 9-10 (summarizing record before the Master). Finally, BP's argument (at 10) that the States could not have intended to create "concurrent" jurisdiction because the Compact uses the word "concurrent" in three other places is wrong. The Master did not conclude that the Compact gave the States concurrent *riparian* jurisdiction, but rather that it gave each State riparian jurisdiction within its own boundary, subject to the general police powers of the sovereign that owns the submerged lands where riparian activities occur.

2. *Hudson County* does not support New Jersey

New Jersey does not dispute that the right to wharf out is subject to regulation to protect other public interests, but it claims (at 36-41) that such regulation is itself an exercise of "riparian jurisdiction." That argument – newly minted for its exceptions – rests on a misreading (at 38-39) of *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), which concerned a New Jersey statute prohibiting the transport of New Jersey's fresh waters to another State. A water company asserted that the statute violated its riparian rights. *See id.* at 353-54. Writing for the Court, Justice Holmes recognized that the case pitted "the private right of property" against "the police power" and held that the State, as "representative of the interests

of the public," may, on a "principle of public interest and the police power," limit the permissible activities of riparian proprietors "to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned." *Id.* at 355-56. The Court made clear that regulation of the water company's use of water obtained through riparian rights was an exercise of the State's police powers, not an exercise of jurisdiction to define or to grant riparian rights. *See id.* at 355.

New Jersey's argument that "'the limits set to property' are not isolated from the property 'right'" but "determine . . . the extent of that . . . 'right,'" Br. 39 (quoting 209 U.S. at 355), is deeply flawed. The Court famously observed that public-interest limitations on a property right are based on "principles of policy which are *other* than those on which the particular right is founded," 209 U.S. at 355 (emphasis added) – *i.e.*, enforcement of non-riparian law is not an exercise of riparian jurisdiction.

In its exceptions, New Jersey makes an argument not previously made to the Master, contending (at 39) that "[s]etting limits on how property can be used is itself an integral part of defining what property rights are" and that "the right to use property and the boundaries of that right are functionally inseparable." In New Jersey's view, any law limiting how riparian "property can be used" is a riparian law, because it defines riparian rights. That view is overly broad and unpersuasive, turning all law into "riparian law." As explained above (*supra* pp. 30-31), riparian law is a subset of property law and thus sets out the rights enjoyed by owners of property adjacent to navigable waters but does *not* set out the rights of the general public. Criminal, environmental, and other regulations limit the use of real property, riparian and otherwise, but that does not make such laws subsets of riparian law insofar as they affect riparian rights.

Many cases have rejected New Jersey's submission and distinguished between riparian property law and general

regulatory law. In *Cummings v. City of Chicago*, 188 U.S. 410, 427-31 (1903), the federal government regulated riparian landowners' wharfing out through a permitting scheme. An owner who complied with that scheme found its project blocked for lack of a permit from the City of Chicago. The owner argued that the city permitting scheme should be preempted. The Court held that compliance with the federal government's regulation of riparian rights did not strip the State of its police powers over the river: "[The] river, it must be remembered, is entirely within the limits of Illinois, and the authority of the state over it is plenary." *Id.* at 427. The fact that the federal government possessed and exercised *riparian* jurisdiction did not mean that "no jurisdiction or authority whatever remains with the local authorities." *Id.* at 426.[29] The Master relied on numerous federal and state cases reaching similar conclusions about the limitations on riparian rights, *see* Rep. 50 & n.98 (citing cases), and New Jersey's position cannot be squared with that extensive precedent.[30]

3. The right to wharf out does not include a right to unload any particular cargo

Because the riparian right to wharf out is a general right to access navigable waters subject to the exercise of police powers, it does not include the right to unload any particular cargo or to engage in any particular activity on

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[29] *See also Obrecht v. National Gypsum Co.*, 105 N.W.2d 143, 149-51 (Mich. 1960) (relying on *Cummings* and *Hudson County* to hold that a State could exercise its police powers over the use made of a wharf, even though the federal government had authorized the wharf's creation).

[30] New Jersey also argues (at 36) that, even if Delaware may exercise its police powers in its territory, it may not do so in a way that "undercut[s]" New Jersey's riparian authority. But "riparian jurisdiction" cannot be jurisdiction to authorize all activities that happen to take place on a pier or wharf, even if the sovereign would otherwise deem such activities unlawful.

a wharf.[31] As New Jersey has admitted, none of its riparian grants permitting construction of wharves authorized any specific activities or cargo to be handled on those wharves, *see* DA 4147-62 (NJ Admissions Response Nos. 1-3, 5-32), nor may the recipient of a New Jersey riparian grant conduct a business activity on a wharf without complying with other applicable law, *see id.* Restrictions on activities on wharves come from non-riparian sources of law. For example, the offloading of drugs, alcohol, cigarettes, pesticides, and natural gas may be regulated and restricted, just as they may be regulated when the cargo is carried over land. *See* Rep. 55-56.

Although ownership of property confers a general right to use that property, an owner may not violate zoning laws or carry on particular business activities without complying with other regulatory and permitting requirements. Likewise, there is no riparian right to drill for oil or valuable minerals from a wharf, as New Jersey concedes (at 36 n.12), or to engage in gaming activities or prostitution thereon, merely because of a general right to use the wharf. Nor is there a riparian right to harvest oysters and other shellfish merely because the wharf is adjacent to or over shellfish beds. *Cf.* 1905 Compact Art. VI. Laws that regulate other uses of a wharf or pier are not "riparian laws" whenever they are enforced against conduct occurring on a wharf.

New Jersey erroneously claims (at 32-33) that authority over "riparian lands and rights" necessarily encompasses "complete authority to determine what riparian improvements – in particular, what piers and wharves – could be built on its shores, even past the low-water mark." The

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[31] *See, e.g., Shively v. Bowlby*, 152 U.S. 1, 40 (1894) ("a riparian proprietor, whose land is bounded by a navigable stream, has the right of access to the navigable part of the stream in front of his land, and to construct a wharf or pier projecting into the stream, for his own use, or the use of others, subject to such general rules and regulations as the legislature may prescribe for the protection of the public"); *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 445-46 (1892) (same).

grant of a right to wharf out would not, for example, foreclose a sovereign's determination that a certain wharf could not be built because it impeded navigation, *see, e.g., United States v. River Rouge Improvement Co.*, 269 U.S. 411, 419 (1926), or violated non-riparian safety laws. Even if New Jersey has "complete authority" to determine what piers and wharves may be built, that is not exclusive authority over the permissible uses of those wharves and the activities of ships that dock on those wharves.[32]

The only riparian expert in this case – Professor Joseph L. Sax, a preeminent authority in water law for more than 40 years – has likewise concluded that "riparian jurisdiction" as used in Article VII cannot be read to mean general police power jurisdiction, but "would have been limited to the administration of the property aspects of riparian landownership on the New Jersey shore, and not to the far more extensive and significant administration of public rights and the general police power." DA 4392-93; *see generally* DA 4279-4302 (Sax Rep.).

4. Concurrent jurisdiction over wharves is administrable and rooted in the historical relations of the two States

New Jersey argues (at 36-41) that Delaware's exercise of police powers over improvements and ships within its waters would be impractical and "unnatural," and that it therefore must have exclusive jurisdiction over wharves extending into Delaware. That argument has no basis in the Compact's text or the States' experience.

First, Articles IV and V of the 1905 Compact provide for concurrent jurisdiction over fishing. Articles I and II (with certain exceptions) also permit each State to exercise concurrent jurisdiction throughout the river to serve

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[32] *Cf. Keyport & Middletown Point Steamboat Co. v. Farmers Transp. Co.*, 18 N.J. Eq. 511, 1866 WL 89, at *5 (N.J. 1866) ("[e]xtraordinary, unusual modes of use, no matter how convenient they may be, are not annexed as incidents in law" to the riparian right to wharf out).

process. Thus, there is no reason to assume the drafters meant to give New Jersey "exclusive jurisdiction" over activities on wharves without saying so explicitly – especially given that New Jersey's 1834 Compact uses the term "exclusive" as to wharves when that was intended. Article VII's use of "*continue to* exercise riparian jurisdiction" further indicates the States had no intent for "riparian jurisdiction" to encompass a sovereign's police powers over activities on its lands.

Second, New Jersey's previous compacts with New York and Pennsylvania established rules giving each State jurisdiction over certain subjects within the same territory. In the 1834 Compact, New Jersey got exclusive jurisdiction over wharves and vessels fastened thereto, with the exception that New York's health and quarantine laws would apply. And the 1783 New Jersey-Pennsylvania Compact gave each State "concurrent jurisdiction within and upon the water, and not upon the dry land, between the shores of said river." DA 4403 (Art. II).

Third, New Jersey agreed in 1989 that the DCZA applies to boundary-straddling public wharves associated with river crossings between the States. *See supra* p. 12. If New Jersey believed that the 1905 Compact precluded Delaware's authority, it would not have done so. That recent action further confirms that Delaware's regulation of activities on wharves extending from New Jersey is workable. *Fourth*, it is well-settled that structures crossing the river, such as bridges, tunnels, ferries, pipelines, and submarine cables, must satisfy the laws of both States, so States routinely exercise such concurrent powers.[33]

Fifth, New Jersey recently represented to this Court that concurrent jurisdiction over Ellis Island – indeed,

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[33] *See, e.g.*, DE SJ Br. 25 (citing *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 622 (1899)); *Bridge over Delaware River v. Trenton City Bridge Co.*, 13 N.J. Eq. 46, 1860 WL 5184, at *3 (N.J. Ch. 1860); *Lehigh Valley*, 1880 WL 7765, at *2; NJ SJ Br. 45 n.24.

over *a building divided by the state boundary* – presented no insurmountable practical problems.[34] Wharves are indistinguishable. *Sixth*, this Court has held that federal and state governments may exercise concurrent jurisdiction over wharves.[35] The Court read an 1899 statute to preserve States' police powers over wharves even when federal authorities established different bulkhead lines.

Finally, *Virginia v. Maryland* does not suggest that concurrent jurisdiction is unworkable. New Jersey claims (at 42) that case establishes that New Jersey must have exclusive jurisdiction over wharves and piers extending into Delaware territory to enjoy riparian ownership of its own shore. But the question here is whether Delaware may enforce its environmental laws when riparian improvements from New Jersey's shore extend past the boundary – not whether New Jersey may authorize those developments. Moreover, the compact and arbitration award interpreted in *Virginia v. Maryland* contained no territorial limitation, whereas the 1905 Compact limits each State's authority to "its own side of the river" – a crucial boundary reference absent in *Virginia v. Maryland*.

In sum, even if New Jersey's riparian jurisdiction could extend beyond its boundary, New Jersey would only have

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[34] *See* DA 4416 (NJ Reply Br., *New Jersey v. New York*, No. 120, Orig.); *see also New Jersey v. New York*, 523 U.S. at 811. New Jersey in that case also relied on other examples of its multi-state cooperation, including since 1921 "through the Port Authority of New York and New Jersey" and since 1961 through "the Delaware River Basin Commission," of which Delaware is also a member. DA 4416; *see also* www.state.nj.us/drbc (DRBC website listing members).

[35] *See Cummings*, 188 U.S. at 428-30 ("When [the state's] power is exercised so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the state and that of the Federal government come in conflict, the latter must control and the former yield."); DA 4289-90 (Sax Rep. ¶ 26) (discussing *Cummings*); *see also Huron*, 362 U.S. at 442 ("In the exercise of that [police] power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government.").

the rights to authorize the erection and maintenance of wharves consistent with the DCZA, to grant or lease the lands necessary to construct them, to determine rules for adjudicating competing claims of upstream and downstream riparian owners on its shore, and to regulate accretion and erosion of riparian lands.[26] Delaware would retain the authority to exercise its general police powers, independent of property holders' riparian rights, to protect public rights in the Delaware River. *See Wedding v. Meyler*, 192 U.S. 573, 585 (1904) (Holmes, J.) ("The conveniences and inconveniences of concurrent jurisdiction both are obvious, and do not need to be stated. We have nothing to do with them when the law-making power has spoken.").

5. The States' conduct since 1905 supports Delaware's exercise of its police powers within Delaware

The Master correctly found that the States' course of conduct since ratification confirms that Delaware may exercise police power jurisdiction over projects extending beyond the low-water mark from New Jersey. *See* Rep. 68-86. *First*, Delaware's lack of regulatory involvement in riparian development from either shore from 1905 to 1961 is hardly a concession that it lacked authority to regulate development within its territory. *See Georgia v. South Carolina*, 497 U.S. 376, 389 (1990) ("Inaction, in and of itself, is of no great importance; what is legally significant is silence in the face of circumstances that warrant a

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[26] *See, e.g., Keyport & Middletown Point Steamboat Co. v. Farmers Transp. Co.*, 18 N.J. Eq. 13, 1866 WL 88, at *5 (N.J. Ch.) (holding that wharf owner has no right to restrain adjacent riparian proprietor from constructing a wharf such that first occupier could no longer make wide turns in front of the adjoining property to dock more efficiently), *aff'd*, 18 N.J. Eq. 511, 1866 WL 89 (N.J. 1866); *Costigan v. Pennsylvania R.R. Co.*, 23 A. 810, 812 (N.J. Sup. Ct. 1892) ("To construct a mill-dam upon one's own property is a perfectly lawful act; but if, by means of such dam, the natural current of the water is obstructed and thrown back upon the lands of another, it becomes actionable as a nuisance.").

response.") (citing *New Jersey II*, 291 U.S. at 376-77). And New Jersey has never contested that Delaware maintained a generally permissive regulatory stance through its common law prior to 1961, when its statutes first governed submerged lands.

Second, as of 1961, Delaware consistently regulated projects within the twelve-mile circle, explicitly grandfathering pre-1969 structures and asserting authority over cross-border projects. The State rejected the 1971 proposed cross-border El Paso LNG unloading facility. *See supra* p. 8. And Delaware also required subaqueous lands leases for structures extending into Delaware by DuPont (1971),[37] Keystone (1991), Fort Mott (1996), and Fenwick Commons (2005). *See supra* pp. 9-10. Indeed, New Jersey itself sought Delaware's permission for the Fort Mott structure, and in 2006 applied to renew its permit. *See supra* pp. 10, 13.

In developing its own coastal zone management plan for federal approval, New Jersey thoroughly investigated its power within the twelve-mile circle and ultimately recognized that "any New Jersey project extending beyond mean low water must obtain coastal permits from both states." DA 4177 (NJ Admissions Response No. 62). New Jersey's suggestion (at 47-48) that its coastal management plan was developed in ignorance of the Compact is untenable. New Jersey's 1979 Options Report concluded that Delaware may regulate or prohibit a proposed project extending from New Jersey into Delaware, based on its detailed boundary analysis of *New Jersey II*, *see* DA 2509, which in turn analyzed the Compact. New Jersey's draft plan recognizing Delaware's regulatory jurisdiction within

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[37] New Jersey focuses (at 47) on the DuPont project, claiming that Delaware retreated from its demand for lease payments. Delaware, however, granted a lease to DuPont and has continued to issue permits for the DuPont facility. Although DuPont disputed Delaware's regulatory authority, Delaware's agreement not to collect payments until the dispute over the outshore lands was resolved did not concede its lack of authority. *See* DA 3409-67; DA 1353-54 (Moyer Aff. ¶¶ 13-18).

the twelve-mile circle was widely distributed to New Jersey government officials, including the Attorney General, who previously had opined that the Compact gave New Jersey no territorial rights within the twelve-mile circle. *See* Rep. 81-82. Before issuing the 1979 Options Report, New Jersey had pledged in 1978 to consult with its Attorney General on boundary issues. *See supra* p. 11 & n.11. And the Compact itself has long been codified in New Jersey's statutes – so New Jersey can hardly argue ignorance of its own laws. *See* N.J. Stat. Ann. §§ 52:28-34 to 52:28-45; 1905 N.J. Laws ch. 42.[38]

New Jersey claims (at 44) that "the most important post-Compact evidence" is not that course of conduct but Delaware's statements in *New Jersey II*. Each statement that New Jersey cites, however, is consistent with Delaware's position that it has police power authority over cross-boundary projects. For example, New Jersey relies (at 44) on a statement by counsel to the Special Master in *New Jersey II* that "in my view the Compact of 1905 ceded to the State of New Jersey all the right to control the erection of those wharves and to say who shall erect them." NJA 126a-1. But that statement is consistent with Delaware continuing to exercise its police powers over activities on wharves in Delaware territory. Immediately after

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[38] Similarly, New Jersey concedes (at 47-49) that its officials accepted Delaware's regulation of projects within the twelve-mile circle, but claims that they did not specifically refer to Article VII. New Jersey's core assertion – that its officials were ignorant of New Jersey's statutes, where the 1905 Compact is codified – is dubious. In any event, the practice of compact or treaty signatories evidences proper interpretation, separate from government officials' interpretations. *See, e.g., United States v. Stuart*, 489 U.S. 353, 369 (1989) (separately treating signatories' practice and the interpretation of provisions by officials charged with their enforcement); *O'Connor v. United States*, 479 U.S. 27, 33 (1986) (course of conduct is evidence of an agreement's meaning); *Brooklyn Life Ins. Co. v. Dutcher*, 95 U.S. 269, 273 (1877) ("The practical interpretation of an agreement by a party to it is always a consideration of great weight. . . . Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties . . . often claim more, but rarely less, than they are entitled to.").

New Jersey II was rendered, Delaware asserted the right to tax wharves extending from New Jersey, belying the suggestion (*see* NJ Br. 45) that counsel conceded *New Jersey's* exclusive jurisdiction over wharves. *See* DA 2098. In any event, New Jersey has abandoned its prescription and estoppel arguments.

New Jersey then cites (at 44) Delaware's statements that "Delaware has never questioned the right of citizens of New Jersey to wharf out to navigable water."[39] None of those statements, however, refers to *New Jersey's* authority to exercise riparian jurisdiction, much less suggests that such authority would be "exclusive" of Delaware's police powers. Rather, Delaware recognized that private riparian owners may wharf out, not who had authority to regulate those rights. In context, Delaware acknowledged that a private owner's right to wharf out was not adverse to the State's ownership of the subaqueous soil. *See, e.g.*, DA 2213-14; *see also* DE SJ Opp. 46-54.

BP argues (at 22-23) that the Master "overlooked a critical episode"[1] in which the Delaware State Highway Department allegedly conceded that New Jersey alone had jurisdiction over cross-border riparian structures. *First*, the letter BP cites was written by the Department's outside counsel (who merely concurred in an opinion rendered by counsel for a private party, DuPont) and does not bind Delaware or its agencies. *Second*, the Department did not adopt that interpretation of the 1905 Compact or suggest that Delaware lacked authority to regulate such projects. Instead, the Department took "cognizance of"

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[39] Despite abandoning its unsuccessful judicial estoppel argument, New Jersey maintains (at 45) that Delaware's representations in *New Jersey II* "played a[n] important role" in the Court's determination of title. But the Master did not read Delaware's statements to concede any authority to New Jersey to regulate riparian rights in Delaware. *See* Rep. 88-91. This Court had found that the 1905 Compact did not go beyond providing "for the enjoyment of riparian rights," 291 U.S. at 377-78, and did not address the scope of riparian rights or the authority to regulate them. *See also* DE SJ Br. 35-45; DE SJ Opp. 21-35.

the lawyer's opinion and stated that it would advise the Army Corps of Engineers that the "Department has no jurisdiction over the area mentioned." NJ Reopen App. 109a-110a. Delaware's 1961 legislation regulating submerged lands superseded the private counsel's earlier incorrect view of Delaware's authority. *See supra* p. 8.[40]

The course of performance thus confirms the 1905 Compact's text: Delaware may exercise its police powers to regulate riparian improvements in its territory.

CONCLUSION

The Court should overrule New Jersey's exceptions and enter the Special Master's proposed decree.

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[40] BP argues (at 24-28) that the Master should have considered and rejected the parties' recent course of performance as evidence of prescription. But Delaware never argued that New Jersey lost any compact rights through prescription. *See* Rep. 92 n.170.

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